BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 51282-S41Q AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G 139972-41Q BY BEN LUND FARMS, INC.	))))))	FINAL ORDER

* * * * * * * * * *

The time period for filing exceptions or objections to the Proposal for Decision of November 8, 1984, has expired. Two submissions were received: one from Bob Larson, Field Manager for the Havre Field Office, Water Rights Bureau, Department of Natural Resources and Conservation (hereafter, "Department"), and one from Harry Chaney. Having given the submissions proper consideration and now being fully advised in the premises, with the exception of the typographical error corrected below, the Department hereby accepts and adopts the Proposal as the Final Order, expressly incorporating same by reference herein.

The submissions from Mr. Larson pointed out the typographical error. On page 6, the description of the amended SB76 Claim filed by Mr. Lund should read: Method of Use: Flood.

The submission from Mr. Chaney made general allegations of fact without reference to the record herein. The receipt of additional evidence after the record has closed is not permitted, and, therefore, Mr. Chaney's letter was given no consideration. Rule 36.12.229(2)(a) A.R.M.

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Wherefore, based upon the foregoing, the Department hereby issues the following:

ORDER

1. Application for Change of Appropriation Water Right No. G 139972-41Q by Ben Lund Farms, Inc., is hereby denied.

2. Application for Beneficial Water Use Permit No. 51282-s41Q by Ben Lund Farms, Inc., is hereby granted. Subject to the terms, conditions, restrictions, and limitations listed below, the Permittee may appropriate from Harwood Lake 5.3 cfs up to 995 acre-feet per year from April 20 - November 1, inclusive, of each year, for irrigation on 400 acres:

160 acres in the SE¼, Section 23, Township 23 North, Range 10 East; 80 acres in the S½ NE¼, Section 23, Township 23 North, Range 10 East;80 acres in the S½ NW¼, Section 24, Township 23 North, Range 10 East; 40 acres in the SW¼ NE¼, Section 24, Township 23 North, Range 10 East; 40 acres in the SE¼ NE¼, Section 24, Township 23 North, Range 10 East, all in Chouteau County, Montana.

The point of diversion shall be in the SE¼ NE¼ NE¼, Section 23, Township 23 North, Range 10 East, Chouteau County, Montana.

The priority date for this Permit is May 20, 1983, at 10:43 a.m.

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a. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana Law.

b. The issuance of this Permit by the Department in no way grants the Permittee any easement rights or the right to enter upon the property of other persons or the Montana Department of State Lands to exercise this Permit.

c. This Permit is granted subject to the right of the Department to revoke or modify the Permit in accordance with § 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with § 85-2-115, MCA.

d. The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.

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NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 21st day of January, 1985.

Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605

Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on January, 1985, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Ben Lund Farms, Application No. 51282-s41Q, for an Application for Beneficial Water Use Permit, and Application No. G 139972-41R, an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies.

1. Ben Lund Farms, Inc., Box 68, Big Sandy, Montana 59520
2. Harry W. Chaney, P.O. Box 1132, Ft. Benton, Montana 59442
3. Ellis E. Chaney, Holiday Haven, Space 41, Moab, Utah 84532
4. J.L. Manley, Box 905, Ft. Benton, Montana 59442
5. Al Cheetham, P.O. Box 112, Ft. Benton, Montana 59442
6. Ron Roman, State of Montana, Department of State Lands, Capitol Station, Helena, MT 59620
7. W.R. Embleton, Rt 1, Ft. Benton, Montana 59442
8. Bob Larson, Water Rights Bureau Field Office, (inter-departmental mail)
9. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 28rd day of January, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Jim P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 51282-S41Q AND APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G 139972-41Q BY BEN LUND FARMS, INC.	)	PROPOSAL FOR DECISION

* * * * * * * * * *

Pursuant to the Montana Water Use Act, Title 85, Chapter 2, MCA (1983), and to the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA (1983), the Department of Natural Resources and Conservation (hereafter "DNRC" or "Department") held a hearing in the above-entitled matter on June 6, 1984, in Fort Benton, Montana.

The Applicant, Ben Lund Farms, Inc., appeared and was represented by Ben Lund.

Harry W. and Ellis E. Chaney did not appear personally or by representative.

J. L. Manley appeared personally and was represented by and through counsel Allin H. Cheetham.

W. R. Embleton appeared, pro se.

DNRC staff expert witnesses Bob Larson and Marvin Cross also appeared.

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STATEMENT OF THE CASE

The Applicant seeks a Permit to appropriate water from Harwood Lake for irrigation of 400 acres of land in Chouteau County. The Application for Change of Appropriation Water Right was filed to obtain authorization for the same project intended under the beneficial water use application. Mr. Lund filed a Statement of Claim for Existing Water Rights for the Water Courts of the State of Montana (hereafter "SB76 Claims") for a 1900 priority date water right out of Harwood Lake. After field investigation by Marvin Cross and Dixie Shiflett, DNRC's Havre field office personnel, it became apparent that historical use under that claimed right could not be corroborated. That is, although William L. Carver, Mr. Lund's predecessor in interest, filed in 1900 a notice of intent to appropriate from Harwood Lake, no physical evidence of actual diversion and beneficial use pursuant thereto existed. Furthermore, no corroboration that such irrigation occurred could be elicited from long-time residents of the area. Afraid that the historic right would be found abandoned, or, never initially perfected, Mr. Lund also filed an Application for Beneficial Water Use Permit, which, if granted, would allow Mr. Lund to commence the project he seeks to begin, even if the change were denied for failure to show an underlying right to change.

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The Applicant seeks water for a limited sprinkler irrigation project for 400 acres near Harwood Lake. The water in the lake is highly alkaline, but, with corrective crop rotation and special fertilizers, Mr. Lund believes he can beneficially irrigate his land, and even improve the salinity problem already in the soil (separate from the additional salinity problems in the water).

The Objectors Harry W. and Ellis E. Chaney objected on several bases, one of which was that their mother homesteaded land, some of which was now inundated by the lake. Mr. Ellis Chaney stated that while he wasn't using the water now, he believed he had a right to preserve it for his future use, on the basis of his homestead rights in the land underneath the lake. Further, the Chaneys alleged the lake to be valuable stop-over habitat for ducks and geese, and that drawing the lake down would not only injure the wildlife habitat, but reduce the value of their littoral property. The Chaneys objected to the change application only, stating that no historic right ever existed, and that for that reason also, the change should not be allowed.

Harry Chaney also objected on the basis of a Certificate of Water Right for domestic use, for up to 30 gallons per minute (hereafter "gpm") from a groundwater well in the SE¼ SE¼ SE¼ of Section 14, Township 23 North, Range 10 East, Chouteau County, Montana. The well is located on the north side of Harwood Lake.

J. L. Manley objected to both applications stating that, because the only source of supply for the lake is spring runoff, and because Mr. Lund would need a right-of-way to complete his appropriation as planned, the proposed use would cause a hardship

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on nearby land owners. Mr. Manley is lessee of Montana Department of State Lands (hereafter, "State Lands") property across which Mr. Lund would need an easement for a pipeline.

The Department of State Lands initially objected to the new use application on the grounds that the original proposed diversion point is on state land, and that Mr. Lund is not the lessee of that tract. Unaware that the Beneficial Water Use Permit would not grant Mr. Lund any rights to trespass on state land, this objector objected simply because without an easement from State Lands, Mr. Lund's project would amount to trespass, and issuance of the Permit would be an adverse affect to State Lands's property rights. By letter of March 26, 1984, Ron Roman, Land Use Specialist, Resource Development Bureau Lands Division, Department of State Lands, indicated State Lands would not attend the hearing because of agreement between State Lands and Mr. Lund that a permit condition be added to any issued permit that the DNRC permit did not grant any necessary easements.

W. R. Embleton filed an objection to the change application, stating as his basis for objection, "we use this water for stock: possible irrigation."

EXHIBITS

The Applicant and Objectors did not offer any exhibits into the record.

The Department moved to admit the contents of the Departmental file into evidence on the record. The file was

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admitted without objection. For ease of reference, the Field Investigation Report signed by Marvin Cross on December 1, 1983, will be referred to as Dept.-1.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and over the parties hereto, whether or not they have appeared. Title 85, Chapter 2, MCA (1983).

2. The Department gave proper notice of the hearing, and all substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. The facts pertinent to Application No. 51282-s41Q were published in the River Press, a newspaper of general circulation in the area of the source, on August 10, 17, 1983.

4. The pertinent facts of Application No. G 139972-41Q were published in the Mountaineer, a newspaper of general circulation in the area of the source, on November 11, 18, and 24, 1982; and in the River Press, also a newspaper of general circulation in the area of the source, on November 10, 17, and 24, 1982.

5. Application for Change of Appropriation Water Right No. G 139972-41Q was regularly filed with the Department on April 28, 1982, at 1:46 p.m.

6. Application for Beneficial Water Use Permit No. 51282-s41Q was regularly filed with the Department on May 20, 1983, at 10:43 a.m.

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7. The Applicant has a present bona fide intent to appropriate water for irrigation of approximately 400 acres of alfalfa, wheat, barley, malt, and sunflowers.

8. Mr. Lund, for Ben Lund Farms, Inc., filed a SB76 Claim claiming an irrigation right as follows[1].

Period of Use:	April 20 - November 1, annually
Source of Water:	Harwood Lake
Method of Use:	Sprinkler
Point of Diversion:	SW¼ NW¼ NW¼, Section 24, Township 23 North, Range 10 East, Chouteau County
Means of Diversion, Conveyance:	Pump (900 gpm); ditch and pipeline
Place of Use and Acres Irrigated:	153.7 acres as follows: 40 acres, SE¼ NE¼, Section 24, Township 23 North, Range 10 East; 40 acres, NE¼ NW¼, Section 19, Township 23 North, Range 11 East; 36.52 acres, Lot 1, Section 19, Township 23 North, Range 11 East; 37.18 acres, Lot 2, Section 19, Township 23 North, Range 11 East.
Flow Rate and Volume Claimed:	2 cubic feet per second (hereafter "cfs") and 480 acre-feet a year.

9. The SB76 claim discussed above (Claim No. 139972) was based upon a Notice of Intent to Appropriate filed on June 11, 1900 in Book 307, Water Right Records, Chouteau County, Montana, by William L. Carver. That Notice indicated Mr. Carver's intent to appropriate 2 cfs from Harwood Lake by means of windmills and ditches, to irrigate his desert land claim, the SE¼ NE¼, Section 24, Township 23 North, Range 10 East, Lots 1 and 2, and the NE¼ NW¼, Section 19, Township 23 North, Range 11 East.

[1] The SB76 claim was amended. The information described is that from the amended claim form.

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10. There is no evidence on the record herein to indicate the appropriation right filed by Mr. Carver was ever actually perfected, and, if so, to what extent Mr. Carver or his successors in interest actually diverted water and put it to beneficial use pursuant to the filed Notice.

11. Pursuant to advice from Marvin Cross, Mr. Lund filed his amended claim, revising downward the volume claimed from 750 acre-feet a year to 480 acre-feet a year to reflect the amount of water which could actually beneficially be used on 153.7 acres, the amount of land more likely appurtenant to the claim.

12. None of the Objectors at the hearing have filed SB76 claims for irrigation out of Harwood Lake. (Testimony of J. L. Manley, W. R. Embleton.)

13. One of the sources of supply for Harwood Lake is spring runoff.

14. Using United States Soil Conservation Service (hereafter "SCS") recognized methods for estimating runoff, Marvin Cross estimated average annual runoff into Harwood Lake to be approximately 1,030 acre-feet with a peak rate of 1,219 cfs.

15. Mr. Cross also estimated runoff using the Orsborne method, a method recommended by the Montana Water Courts but developed primarily for use in western Montana. Using the Orsborne method, Mr. Cross calculated an estimated average annual runoff into Harwood Lake of 2,857 acre-feet.

16. The Orsborne method is an inaccurate method of estimating runoff in eastern Montana, and, is therefore inappropriate in the instant case. (Testimony of Marvin Cross).

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17. Marvin Cross also used an unofficial method of estimating average annual runoff described to him by an unnamed United States Geological Survey (hereafter "USGS") representative in Helena. Using this method, an average annual runoff of 700 acre-feet was predicted.

18. From his various run-off analyses, Mr. Cross concluded that testimony from long-time residents in the area was needed to help establish actual runoff into the lake. The various methodologies used to calculate runoff resulted in predictions ranging between 700 acre-feet and 2,857 acre-feet per year.

19. Long-time residents of the area indicated that Harwood Lake is slowly getting bigger - at least this has been the case since 1948 when the lake may have been dry. (Testimony of Mr. Manley.)

20. The USGS map of Harwood Lake, provided by the DNRC Havre field office personnel, and included in the Departmental file, corroborated the testimony of the Applicant and Objectors that the lake is slowly enlarging. The map was published in 1972, and Mr. Lund, Mr. Embleton, and Mr. Manley agreed that the present lake dimensions show increased lake size today.

21. There are no intermittent or perennial streams leading into or out of Harwood Lake.

22. Snowmelt, or spring runoff, is not the sole source of water supply for Harwood Lake. Mr. Embleton and Mr. Manley testified to at least two separate springs which feed the lake.

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23. Although the flow rate and volume of water the springs contributed to the lake is unknown, Mr. Embleton testified that his cattle never perceptibly drew the springs down by watering there.

24. Whether the water quality of the lake is deteriorating or improving is impossible to determine from this record. (Testimony of all parties; testimony of Marvin Cross.)

25. Whether withdrawal of water from the lake will improve or adversely affect the water quality therein is impossible to determine with certainty from the record herein. (Testimony of Marvin Cross; testimony of Applicant.)

26. The water quality of the springs contributing to the lake is better than that of the lake, as the cattle will water in the vicinity of the spring water whenever possible. (Testimony Mr. Embleton.)

27. Presently the amount requested in Permit Application 51282-s41Q is available in Harwood Lake. Because of the uncertainty regarding the volume of output from contributing springs and the amount of runoff which contributes to the lake, it is unclear what the effect of the withdrawal of 995 acre-feet will be to the lake.

28. Because at least one source for the lake is certainly better quality water than the water generally occurring in the lake, it is more likely than not that the withdrawal of lake water will improve the quality of water overall in Harwood Lake.

29. The proposed means of diversion and irrigation are reasonable and customary for the intended use and will not result in a waste of the water resource.

30. The current water quality of the lake is suitable for stock-water use as well as irrigation. (Testimony of Applicant, testimony of Mr. Manley)

31. The 1900 right for which the Change Authorization is sought may or may not have ever actually been put to use.

32. The method of appropriation indicated on the notice was windmills and ditch.

33. There is no physical evidence to indicate a ditch ever existed at the place proposed by Mr. Carver. (Testimony of Applicant; testimony of Marvin Cross.)

34. There is no physical evidence to indicate that any windmills were constructed at Mr. Carver's proposed place of appropriation.

35. For Mr. Carver to complete his appropriation as proposed in his notice, he would have had to pump the water 40 feet uphill from the lake. That is, the land which was to have been irrigated is approximately 40 feet higher in elevation than the most convenient point of diversion on the south side of Harwood Lake. (Derived from testimony of Marvin Cross and the U.S.G.S. Topographic map on file.)

36. Numerous windmills of the type available in the early 1900's would have been necessary to provide the requisite lift to complete the appropriation as noticed by Mr. Carver. Marvin Cross testified that four or five of the large, wooden, Denmark windmills would have been necessary for the job, and that as many as 200 "American" type windmills would have been necessary to pump the cfs the necessary height.

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37. A large steam engine could also have provided the requisite power for a pump to lift the water for the Carver appropriation. (Testimony of Marvin Cross).

38. There was no testimony by long time residents of the area to indicate the Carver right was ever perfected. (Testimony of Mr. Manley, Mr. Embleton, Mr. Lund).

39. Neither the Objectors nor the Applicant could recollect any irrigation occurring under the Carver claimed right.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether or not they have appeared.

2. The Department gave proper notice of the hearing, and all substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. Harry and Ellis Chaney are in default pursuant to Rule § 36.12.208, Administrative Rules of Montana.

4. The Department is directed to approve a proposed change in use if the rights of other appropriators will not be adversely affected. § 85-2-402, MCA (1983).

5. The Department may approve a change subject to such limitations and conditions it considers necessary to protect the rights of other appropriators. § 85-2-402(4) MCA (1983).

6. An appropriator must make a prima facie showing of an existing water right in order for the Department to authorize a change in use thereof. Any change authorization resulting in a

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greater use than that existing before the change is tantamount to the issuance of a Beneficial Water Use Permit, or the creation of a new right, pro tanto. Featherman v. Hennessey, 43 Mont. 310, 115 P. 983 (1911); Toohey V. Campbell, 24 Mont. 13, 60 P. 396 (1900); In the Matters of the Application for Beneficial Water Use Permits Nos. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ by Meadow Lake Country Club Estates; and In the Matters of the Application for Change of Appropriation Water Right Nos. 26719-c76LJ and 26720-c76LJ by Meadow Lake Country Club Estates, Final Order, October 6, 1981 (incorporating Proposal for Decision of August 25, 1981).

6. MCA § 85-2-311 directs the Department to issue a permit;

> "if the applicant proves by substantial credible evidence that the following criteria are met:
> (a) there are unappropriated waters in the source of supply:
> (i) at times when the water can be put to the use proposed by the applicant;
> (ii) in the amount the applicant seeks to appropriate; and
> (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
> (b) the water rights of a prior appropriator will not be adversely affected;
> (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
> (d) the proposed use of water is a beneficial use;
> (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved."

8. The proposed use, irrigation, is a beneficial use. § 85-2-102(2); Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905).

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9. Beneficial use is the base, measure and limit of the right. Bailey v. Tintinger, 45 Mont. 54, 122 P. 575 (1912); v. Butte Electric & Power Co., 32 Mont. 56, 79 P. 549 (1905); Peck v. Simon, 101 Mont. 12, 52 P.2d 164 (1935)

10. Where an appropriator fails to complete his diversion works and put the water claimed to beneficial use, the water right never vests. That is, the mere filing of a Notice of Intent to Appropriate is only one step in the process of creating a water right. Miles, supra. It is only upon actual diversion and use that the right is created.[2]

11. Where an appropriator ceases to use his water right, with intent to abandon it, the right ceases to exist. 79 Ranch, Inc. v. Pitsch, 40 St. Rep. 981, ___ Mont. ___, 666 P.2d 215 (1983). Nonuse for an extended period of time is strong evidence of intent to abandon. Pitsch, supra.

12. There is insufficient evidence on this record to determine whether the water right sought to be changed in Application No. G 139972-41Q has been abandoned, in whole or in part, or if it ever was perfected. There is also insufficient evidence on the record that the right exists as it was claimed on the SB76 form. (Testimony of Applicant, Objectors, and of Marvin Cross.)

[2] The posting of a notice may allow the appropriator to claim a priority date earlier than the date of actual use. That is, prior Montana statutory law allowed an appropriator to relate back when the statutory notice requirements were followed. It has always been the use, however, and not the filing or posting of notice, from which the water right arose.

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13. The Applicant has failed to sustain his burden of proof on the issue of the scope of an existing right such that the Department may authorize a change in use therefor. While the Department has no authority to make a finding of abandonment herein, neither can it use the change authorization procedure to create a new right. In the Matter of the Beneficial Water Use Permits Nos. 26722-s76LJ, 26723-s76LJ and 26718-s76LJ by Meadow Lake Country Club Estates; and In the Matter of the Application for Change of Appropriation Water Rights Nos. 26719-c76LJ and 26720-c76LJ by Meadow Lake Country Club Estates, Final Order, October 6, 1981.

14. Although the filing of an SB76 claim is prima facie proof of its content until the issuance of a final decree, § 85-2-227 MCA (1983), the evidence adduced at the hearing is sufficient to overcome the claim.[3]

15. The Department has no authority to prevent the claimant from utilizing his claimed right as described in his SB76 claim. This authority resides in the Water Courts. The Department, however, cannot authorize the Applicant to exercise this right by means of the project described in the change authorization. See generally, Title 85 Chapter 2, Part 2, MCA (1983).

16. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

[3] "Prima facie evidence" is that which proves a particular fact until contradicted and overcome by other evidence. § 26-1-102(6) MCA (1983).

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17. The proposed use will not adversely affect the water rights of a prior appropriator unless the withdrawal of water from Harwood Lake effectively dries up the lake or causes the water quality to deteriorate to the point that the Objectors cannot reasonably exercise their stockwater rights. There is substantial credible evidence on the record to indicate that the water rights of prior appropriators will not be adversely affected.

18. Substantial credible evidence on the record shows that there are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant; in the amount the Applicant seeks to appropriate; and throughout the period during which the Applicant seeks to appropriate, the amount requested is available.

19. The proposed means of diversion, construction and operation of the appropriation works are adequate.

Wherefore, based upon the foregoing Findings of Fact and Conclusions of Law, and upon the record proceedings herein, the Hearing Examiner hereby makes the following:

PROPOSED ORDERS

1. Application for Change of Appropriation Water Right No. G 139972-41Q by Ben Lund Farms, Inc., is hereby denied.

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2. Application for Beneficial Water Use Permit No. 51282-s41Q by Ben Lund Farms, Inc., is hereby granted. Subject to the terms, conditions, restrictions, and limitations listed below, the Permittee may appropriate from Harwood Lake 5.3 cfs up to 995 acre-feet per year from April 20 - November 1, inclusive, of each year, for irrigation on 400 acres:

160 acres in the SE¼, Section 23, Township 23 North, Range 10 East; 80 acres in the S½ NE¼, Section 23, Township 23 North, Range 10 East;80 acres in the S½ NW¼, Section 24, Township 23 North, Range 10 East; 40 acres in the SW¼ NE¼, Section 24, Township 23 North, Range 10 East; 40 acres in the SE¼ NE¼, Section 24, Township 23 North, Range 10 East, all in Chouteau County, Montana.

The point of diversion shall be in the SE¼ NE¼ NE¼, Section 23, Township 23 North, Range 10 East, Chouteau County, Montana.

The priority date for this Permit is May 20, 1983, at 10:43 a.m.

a. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana Law.

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b. The issuance of this Permit by the Department in no way grants the Permittee any easement rights or the right to enter upon the property of other persons or the Montana Department of State Lands to exercise this Permit.

c. This Permit is granted subject to the right of the Department to revoke or modify the Permit in accordance with § 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with § 85-2-115, MCA.

d. The issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this Permit, nor does the Department in issuing the Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Permit.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due

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consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments to the Water Resources Administrator, but oral argument must be requested in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1)

DONE this 8th day of November, 1984.

Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

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MEMORANDUM

The Department cannot issue the Change Authorization sought herein because of Applicant's failure to make a showing of an existing right. It is fundamental to Montana Water Law, Featherman v. Hennessey, supra; Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974), as well, it is a matter of common logic that one cannot change a water right that does not exist. While the Department will not usually inquire as to matters of disputed ownership*, it must, as a subject matter jurisdictional issue, require a preliminary showing that the claimed existing right, if disputed, exists. Further, where the scope of the right is challenged, the Department must determine the historic use of the right, and may grant a Change Authorization for only that amount. To act otherwise would conflict with the Water Use Act specific provisions for acquiring the right to appropriate. See, § 85-2-301 MCA (1983). "Since an appropriator cannot in the normal course of exercising his appropriative right expand or otherwise enlarge his historic beneficial use by virtue of his original application, it is clear that the same cannot be done under the guise of a change proceeding". In re: Meadowlakes Estates, P. 58 Proposal for Decision.

* For example, if an objector alleged she (rather than an applicant for change authorization) owned the underlying right the applicant sought to change, but did not dispute the existence or scope of the right, the Department would proceed to process the change application. A determination of adverse affect to other appropriators or the stream can be made separate from the question of the ownership of the right sought to be changed. In the Matter of the Application for Change of Appropriation Water Right No. G-05081 and G-05083 by Neil W. Moldenhauer, FinaL Order, March 24, 1984.

The Water Use Act under which the Department functions, did not change the substantive 100 year old case law defining the nature of water rights in Montana. "The law has not been changed. The Department has simply been given a review to determine the same issue that could previously have been determined only by a District Court. "Castillo v. Kunneman, 39 St. Rep. 460, 642 P.2d 1019 (1982).

Hence,the Department must be guided by the bibliography of Montana Water Law in administering the Act. It has always been the case that a water right owner was entitled to change a point of diversion or use if the change did not work injury to other appropriators. Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940); Lokowich v. City of Helena, 46 Mont. 575, 129 P.2d (1913); Thrasher v. Mannix & Wilson, 95 Mont. 273, 26 P.2d 370 (1933). Most importantly, such was the law in June, 1900, the time the right in issue in Application No. 51282-s41Q may have arisen. It is to this law, the law at the time the right vests, that governs, or, that creates the right, defining its scope and limitations. Anaconda National Bank v. Johnson, 75 Mont. 401, 244 p. 141 (1926); Popham v. Holloran, 84 Mont. 442, 275 p. 1099 (1929).[5]

[5] Of course, the underlying right could have vested at any time prior to 1973, to the extent, and with the priority date as of the application to beneficial use, or as of the posting or filing of an appropriate notice of completion of the diverison works is pursued diligently. Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912). It could also be several rights, if the development occurred incrementally, rights vesting at the time of their uses and as each parcel was added to the system. The only evidence of the underlying right, however, is the copy of the notice Mr. Carver filed in June 1900, and upon which the Applicant herein relys as proof of the right.

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In Popham, for example, the statute in effect at the time the case was decided provided for appropriation of flood, seepage, and waste waters, whereas the statute in effect at the time the disputed appropriation began, did not. The later statute was deemed inapplicable and the use of flood or seepage waters was held not an "appropriation" within the meaning of the water laws. Similarly, see, Oscar Hill v. Merrimac Cattle Company, Inc., 41 St. Rep. 1504 (1984) for a determination of whether prescriptive water rights had arisen, where the court analysed the right under the effective dates of relevant statutes over a period of time.

The statute in effect at the time Mr. Carver filed his Notice of Intent to Appropriate was the Montana Civil Code of 1895, Title VIII. Therein are codified the basic principles of water law which govern today. Among the provisions is that a prospective appropriator must post a notice (§ 1886 Civil Code, 1895) and proceed to complete the appropriation with reasonable diligence, § 1887, Civil Code, (1985). Although subsequent case law interpreted the notice provisions as not mandatory, Murray v. Tingley, 20 Mont. 260, 50 P.723 (1987); Musselshell Valley Farming & Livestock Co. v. Cooley, 86 Mont. 276, 283 P. 213 (1929), the requirement of actual use of the water has never varied, (see generally, Bailey, supra), and, the rule that an appropriator may not, through a change in use, increase the amount of water historically diverted, has similarly remained steadfast. Smith v. Duff, 39 Mont. 382, 102 p. 981 (1909); Galiger v. McNulty, 80 Mont. 339, 260 p. 401 (1927); Cate v. Hargrave, 41 St. Rep. 697, 680 P.2d 952 (1984).

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There is simply no evidence on the record herein, that the right as noticed by Mr. Carver ever ripened into a vested right - almost certainly it did not vest in the amount claimed. There is no physical evidence of any diverison or irrigation, and no residents of the area recall any oral history which indicated the irrigation occurred. The method claimed was by ditch and windmills, which, definitely never came to pass. Whether some smaller appropriation, by means other than windmills and ditches, vested, and whether or not that right was subsequently abandoned, cannot be determined with certainty. Suffice it to say that the evidence on the record is competent to rebut the prima facie evidence of the SB76 filing. Marshall v. Minlschmidt, 148 Mont. 263, 419 P.2d 186 (1966).

The filings under SB76 are not terribly dissimilar to those required to invoke the doctrine of relation back under pre-1973 statutory law. Such notices were also primie facie, yet their introduction into evidence did not discharge a party's burden of proof of the extent of the right. Parties attempting to show an existing right still had the burden of showing that all the water had been put to a beneficial use over a reasonable period of time. Holmstrom Land Company v. Meagher County Neulan Creek Water District, et al., 36 St. Rep. 1403, 605 P.2d 1060 (1979); Irion v. Hyde, 107 Mont. 84, 81 P.2d 353 (1938).

Of course, these cases specifically concerned adjudication, which are not within the province of the Department. Nonetheless, the Department cannot accept carte blanche

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statements made in notices of appropriation and SB76 filings based exclusively thereon, when the overwhelming weight of the evidence in the record is clearly to the contrary.

In Vidal v. Kensler, 100 Mont. 592, 51 P.2d 235 (1935) an appropriator's notice claimed a priority date of 1906, but his testimony was offered to show an actual earlier appropriation. Although the trial court's judgement that the priority date for the right was June 15, 1904, was overruled, the Supreme Court held the testimony sufficient to rebut the prima facie evidence of the filing, and ordered the trial court to award a priority date of June 15, 1905. There, only two witnesses spoke to their recollections of more than twenty years earlier, and the testimony was sufficient to rebut the filing.

With regard to the new use application, the Applicant met his burden to show, by substantial credible evidence, all the statutory criteria for permit issuance. The Objectors have minimal rights out of Harwood Lake, and should the Permittee's use interfere with their reasonable exercise of their rights, his use will be curtailed in order that theirs be satisfied. Beaverhead Canal Co. v. Dillon Electric Light and Power Co., 34 Mont. 135, 85 p. 880 (1906); Raymond v. Wimsette, 12 Mont. 551, 31 P. 537 (1892). The Objectors have no right to insist that Harwood Lake water go unused so that they may use it in the future. Their existing rights do entitle them to maintenance of a lake level high enough for them reasonably to exercise those rights. § 85-2-401(1) MCA 1983.

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Although the water quality is admittedly marginal, the Applicant testified that he had researched the matter and believed with limited irrigation, crop rotation, and application of low P.H. fertilizer and sulfuric and phosphoric acid, the water would increase his farm production. Further, Mr. Manley testified that although he only once attempted to irrigate from Harwood Lake, the water quality did not present a problem.

Mr. Manley's objection that the pipe placement would interfere with his cattle crossing from one pasture to another was rendered moot by the State Lands' requirement that any easement for the use of that land would have to be approved by Mr. Manley, as lessee of the land involved.

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on November 14, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Ben Lund Farms, Inc., Application No. 51282-s41Q, for an Application for Beneficial Water Use Permit, and Application No. G 139972-41R, an Application for Change of Appropriation Water Right, addressed to each of the following persons or agencies:

1. Ben Lund Farms, Inc., Box 68, Big Sandy, Montana 59520
2. Harry W. Chaney, P.O. Box 1132, Ft. Benton, Montana 59442
3. Ellis E. Chaney, Holiday Haven, Space 41, Moab, Utah 84532
4. J.L. Manley, Box 905, Ft. Benton, Montana 59442
5. Al Cheetham, P.O. Box 112, Ft. Benton, Montana 59442
6. Ron Roman, State of Montana, Department of State Lands, Capitol Station, Helena, MT 59620
7. W.R. Embleton, Rt 1, Ft. Benton, Montana 59442
8. Bob Larson, Water Rights Bureau Field Office, (inter-departmental mail)
9. Sarah A. Bond, Hearing Examiner (hand-deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 14th day of November, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Kohn
Notary Public for the State of Montana
Residing at Montana City
My Commission expires 3-1-85

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